No. 12677

In the United States Court of Appeals for the Ninth Circuit

KAM KOON WAN, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER PERSONS AND EMPLOYEES OF DEFENDANT WHO ARE SIMILARLY SITUATED, APPELLANTS

v.

E. E. BLACK, LTD., A HAWAIIAN CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII

SUPPLEMENTAL MEMORANDUM FOR MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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SUPPLEMENTAL MEMORANDUM FOR MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE[1]

Subsequent to the original submission of this case under No. 12229, the United States Supreme Court handed down a significant decision in *Powell* v. *United States Cartridge Co.,* and in the companion

[1] Subsequent to the filing of a brief *amicus curiae* in No. 12229, same title as this appeal, by the Administrator of the Wage and Hour Division, the Secretary of Labor, by virtue of 5 U. S. C., sec. 22 and Reorganization Plan No. 6 of 1950 (15 F. R. 3174), effective May 24, 1950, succeeded to the Administrator's rights and duties with respect to litigation under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, hereinafter referred to as "the Act."

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cases of *Aaron* v. *Ford, Bacon & Davis, Inc.,* and *Creel* v. *Lone Star Defense Corporation,* 339 U. S. 497, which has a direct bearing on the issues in this case.

The Supreme Court's decision is of particular importance as it relates to the question whether compliance with military orders regulating wages and working conditions in Hawaii made compliance with the Fair Labor Standards Act impossible (Administrator's brief, pp. 12–18). This question arises with respect to wage claims allegedly owed for the period from December 7, 1941, to November 10, 1943. The court below in the instant case assumed that compliance with the Act was "impossible" (R. 48) and that appellee had "no freedom of choice" other than to violate the Fair Labor Standards Act (R. 45). On that assumption the trial court concluded that appellee's noncompliance with the Act was "in good faith in conformity with and in reliance on" orders of an agency of the United States (R. 147, 151), thus establishing a defense under Section 9 of the Portal-to-Portal Act.[2]

It is the Government's position that this ruling was erroneous because nothing in the military orders precluded concurrent compliance with the Act (Adm. Br. pp. 12–18). The principal holding of the Supreme Court in the *Powell* and companion cases, *supra,* was that private contractors working under public contracts stand in no different position with

[2] 61 Stat. 84, 29 U. S. C., Supp. III, 251, reprinted in the Administrator's brief in No. 12229, Appendix A, p. 20.

respect to compliance with the federal labor standards than other private contractors who are engaged in activities covered by the Act. One of the contentions of the contractors was that the Walsh-Healey Public Contracts Act and the Fair Labor Standards Act were mutually exclusive. This view, adopted by the Court of Appeals for the Eighth Circuit in the *Powell* and *Aaron* cases, 174 F. 2d 718 and 730, was explicitly rejected by the Supreme Court. The two Acts were held to be "mutually supplementary" * * * "Despite evidence that the two statutes define overlapping areas, * * *." (339 U. S. 519–520.) The Walsh-Healey Act (like the military orders in this case) provides, inter alia, that overtime compensation be paid for hours worked in excess of 8 in any one day, and it was therefore urged that the Fair Labor Standards Act with its weekly overtime provisions was inconsistent and therefore not applicable to the contractors' employees. Substantially the same argument urged in the *Powell* and *Aaron* cases is urged here, i. e., since the military orders provide for daily overtime, the Fair Labor Standards Act provision for weekly overtime is inconsistent and cannot apply. The Supreme Court rejected this argument in the *Powell* and *Aaron* cases, stating:

> There has been no presentation of instances, however, where compliance with one Act makes it impossible to comply with the other. There has been no demonstration of the impossibility of determining, in each instance, the respective wage requirements under each Act and then applying the higher requirement as satisfying both [339 U. S. at 519].

Like the Walsh-Healey Act, which was held compatible with concurrent operation of the Fair Labor Standards Act, the military orders—containing substantially the same wage standard as the Walsh-Healy Act—are equally compatible with concurrent operation of the Fair Labor Standards Act.

The Supreme Court's decision in the *Powell, Aaron,* and *Creel* cases also conclusively demonstrates the error of the district court's ruling in the instant case that work on some of the projects was excluded from coverage under the Fair Labor Standards Act because it was performed on military reservations (R. 79). In all three cases before the Supreme Court the work was performed on Federal military reservations, and this fact was urged by respondents before the Supreme Court to support a contention that coverage was defeated. (Supreme Court, October Term 1949, No. 58 *Creel* v. *Lone Star Defense Corp.,* Brief of Respondent pp. 7, 12; No. 79 *Aaron* v. *Ford, Bacon & Davis,* Brief of Respondent pp. 11, 21; No. 96 *Powell* v. *United States Cartridge Company,* Brief of Respondent pp. 11, 12, 30). The Court, however, did not consider the situs of the work as relevant to a determination of coverage.

The Supreme Court's decision also supports the Administrator's position that the Act should not be construed to exclude broad categories of employees without inquiring into the details of their duties (Adm. Br. pp. 4–8). Referring to the "breadth of coverage" of the Act and the "narrow and specific" exemptions, the Court stated "Such specificity in

stating exemptions strengthens the implication that employees not thus exempted, such as employees of private contractors under public contracts, remain within the Act" (339 U. S. at 517). Thus to ignore the possible interstate activities of individual claimants by summary conclusion that *no* work relating to the numerous projects here involved could come within the coverage of the Act is, in effect, to provide by implication sweeping exemptions for many kinds of work. The decision below disposes summarily of complex factual issues based only on brief descriptions of the projects to which the employees' work related. The Secretary, therefore, respectfully suggests that this Court remand the case for detailed consideration by the trial court with respect to the interstate aspects of the individual claimants' work. Cf. *Waialua Agricultural Co.* v. *Maneja,* 178 F. 2d 603 (C. A. 9), certiorari denied 339 U. S. 920.

Respectfully submitted.

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